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EMOTIONAL EXCESSES AS ELEMENTS OF THE LAW

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Paper
delivered on 10 December 1999
at the Centre for British Studies,
Humboldt University, Berlin
Conference: „Representations of Emotional Excess“

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Emotional Excesses as Elements of the Law

A. Introduction

For the key-word 'emotion', the British Library's Online Public Access Catalogue lists¹ exactly 1,076 titles for the period since 1980. These titles promise to tell us all about emotions under nearly every conceivable aspect, ranging from *The Emotional Cook. Food to Match your Mood*² to the *Body Language of Horses*³, with scores of books in more central areas like 'emotions and literature' or 'emotions in psychology'. I was, of course, looking for books on 'emotions and the law', to get an idea about the present state and the current directions of research on emotions in or into my own field of work, the law. Reading title after title after title, I gradually realized that I would have to pursue some other course to prepare this paper: Of all the 1,076 titles on 'emotions' there was exactly one dealing with 'law and the emotions' in a general way, a small book with the interesting sub-title "Prolegomena for a psychoanalytic approach to legal study"⁴. No doubt, some relevant books could

1. On 8 December 1999.

2. Clare McKeon, *The Emotional Cook. Food to Match your Mood*, Dublin 1996.

3. Tom Ainslie, *Body Language of Horses, Revealing the Nature of Equine Needs, Wishes and Emotions and how Horses Communicate them*, New York 1980.

4. Costas Douzinas, *Law and the emotions: prolegomena for a psychoanalytic approach to legal study*, San Domenico,

be found in other libraries, and some will be listed under different keywords⁵, but the overall situation is quite clear: the role of emotions in and for the law and the impact of the law on emotions in a *general* way has recently *not* been a major field of research.

Thus, instead of presenting the results of such research, I'll have to do my own sort of prolegomena and shall attempt

- to conduct a first stocktaking of various points of contact between 'emotions' and 'law' and their interrelationship in these situations,
- to arrange some of these points of contact into a preliminary grouping, and
- to indicate some directions, where further research might yield interesting results.

B. 'Emotions' and 'Law'

I. The Function of the Legal System

In a very general sense, the whole legal apparatus might be explained as a gigantic attempt to prohibit, restrain or control excessive emotions, or rather *actions* based on such emotions. In all modern countries an aggrieved person or victim of an action perceived as a wrong or a crime, and the victim's friends and relatives are - as a rule - prohibited to "take justice in their own hands", to act themselves and at once out of indignation, out of a feeling of being insulted or otherwise wronged. Instead, modern states entertain an elaborate machinery of courts, prosecutors and judges, and judgement enforcement officers and institutions, to provide a credible alternative to self-help, blood feuds and other types of revenge. The states claim for themselves a double monopoly: not only the monopoly for defining legal wrongs and adequate reactions to such wrongs, but also the monopoly for applying force to execute such reactions in order to prevent disputes between individuals from getting out of hand and from endangering domestic peace through overreaction and

1998.- A second book with a promising title, Jes Bjarup's *Reason, Emotion and the Law*, Edinburgh 1982, is a book on the philosophy of Axel Hägerström.

5. 'Violence', for instance, comes to mind. On aspects of violence in a legal context see the paper of Catherine Lutz

perpetuation of feuds.

If we go back in history to times when states were not yet powerful enough to enforce legal restraints on revenge, and punishment had to be based on self-help because a police or law machinery did not exist or was not efficient, we find that communities at least developed rules⁶ on how and how long to conduct a blood feud to provide some framework for an eventual abatement of reactions and counter-reactions.

II. The Legal System as Cause for Emotional Excesses

1. Acts, Interventions

Although meant to curb emotional excesses, the legal system does not always succeed in doing so. Sometimes it can even be the *cause* for extreme emotional reactions.

This may occur when an intervention or other action by somebody from among the legal personnel (e.g., a police officer or judge) is not - at least grudgingly - accepted by the addressee of the action, but regarded by that person as being too harsh or too unfair or as just too much to bear in a particular situation, either because that police officer or judge indeed overstepped the limits of what was reasonably to be expected under the circumstances, or - more often - because their action was directed at a person already on the brink of emotional instability. Examples are defendants who killed the judge in the court room when judgement was passed against them⁷, or police officers who

and Thomas Chivens, in this volume.

6. An impressive example is the Albanian *kanun*, a very elaborate set of such rules, collected by Shetjefën Gjeçur (*Kanuni I Lekë Dukagjinit*). An English translation by Leonard Fox was published in New York 1989.- For a vivid treatment of blood revenge according to the *kanun* in a novel see Ismail Kadaré, *Prilli i thyer* (= *Broken April*, London 1990, *Der zerrissene April*, Wien 1989).

7. An example is the case of Erwin Mykolajczyk in March 1994 in Euskirchen, Germany. When fined for battery he shot the judge and six other people in the court room and finally killed himself using a hand grenade. (Die Welt, 8 May 1998.)

got attacked or even killed⁸ for simply stopping a motorist for some minor traffic offence – "road rage" appears to be the new term, though usually applied for violence amongst motorists. The actor Michael Douglas in the film *Falling Down* showed the emotional build-up of such a situation in an impressive way.

While tragic in themselves and for those involved, these are usually isolated cases - explainable, if at all, by the specific characteristics of the situation and the persons involved rather than by particular features of the legal system. These cases do not pose any threat to the legal system as such, certainly not in contemporary western societies where the general population does not usually regard the law as being too harsh.

2. Omissions, Failures to Act Satisfactorily

Sometimes, however, it is not the actions or interventions of the legal personnel, but rather their omissions to act or their perceived failure to act in a satisfactory manner. Examples are court room tragedies of victims or close friends or relatives of victims attacking or even killing the defendant the moment the jury or the judge declare an acquittal or pass a judgement regarded as too lenient⁹. Rape cases come to mind, or cases about children killed by recklessly driving motorists.

If such incidents should significantly increase in number - and I must add that I know of no statistics, but anecdotal evidence suggests at least some increase - this could give cause for more general concern about the law. It could mean that its capability of fulfilling its function of replacing self-help and revenge with a rational and regulated system of reactions on crimes is in jeopardy.

8. See for instance a case reported in the Berlin 'Tagesspiegel' on 20 January 2000: a policeman was killed for taking a radar photo of a speeding motorist.

9. Even the expectation of too lenient a sentence may be enough. An example is the case of Marianne Bachmeier. Before judgement was passed she killed the man who was accused of murdering her daughter. This happened in a Lübeck court room in March 1981. For more details see her autobiography: *Palermo, Amore mio*, München 1994, or the obituary in *Berliner Zeitung* of 20 September 1996.

3. Encouragement of Emotions

Although the law generally tends to disapprove of emotions or at least of excessive emotional acts, in some contexts characteristics of the very structure of the legal systems lead to the opposite result of allowing, attracting or even actively encouraging the application, display or living out of emotions.

a) A case in point is the jury system as practised in modern English and, in particular, American law. Entrusting the verdict or the award of damages exclusively to a group of lay people results in lawyers playing up to the jury, to their real or assumed prejudices. Methods applied are attempts to arouse their emotions of sympathy for the defendant or for the injured plaintiff, or on the other hand to stress the real or alleged unattractive features of the opposite party in exaggerated ways or by employing less than straightforward means. Some lawyers are experts in moving members of the jury to tears, others have their more subtle ways of influencing them.

To give but one example for the latter sort of tactics, let me quote a paragraph from the book *The Lawsuit Lottery* by Jeffrey O'Connell. One chapter of the book deals with the tricks of successful American trial lawyers. Of Max Wildman, one of these lawyers, the author writes:

In one trial in which Mr. Wildman's client was charged with negligence by a middle-aged businessman whose wife died in an auto wreck, he had his attractive blond secretary come into the court-room at the end of the trial and sit next to the widower. Following Mr. Wildman's instructions, she asked the man an innocent question, smiled, patted his hand and quickly left. "Just one look at the cold expressions on the lady jurors' faces was enough to tell me that we were home free," Mr. Wildman recalls with a smile. "When the jury came back with [a verdict against him] the plaintiff's lawyer never knew what hit him. You see, the entire interchange took place

while he was facing the jury in the midst of his closing argument.¹⁰

b) Emotions as Tools to Sidestep the system

Whereas in the jury context the structure of the legal system allows or even tempts the participants to use emotions as a tool to further their interests in a way basically contrary to the rationale of the law, there are situations where the law system itself favours or even prescribes the use of procedures allowing emotions to play a positive part in solution-seeking and problem-solving. In recent years just because it became apparent that the rational, rule-based, single-issue-focussed approach of the law has its limitations (and is quite costly at that) a variety of possible other procedures have been discussed. "Alternative Dispute Resolution" or "Mediation" are the headlines of such discussions and one feature common to several of the procedures discussed is that they should not avoid or stifle emotions, but rather bring them into the open to allow - in a quasi-therapeutical sense - to get at the core of the conflict which might lie underneath the narrow legal issue in dispute.¹¹

III. Emotional Excesses as Data for the Law

Of particular interest are, however, those parts of substantive law which contain specific legal reactions to specific types of emotional excesses or specific situations in which they occur, in other words: emotional excesses or emotionally motivated acts as *Tatbestandsmerkmale*, i.e. definitional or constituent elements of particular legal provisions. In other words: where does the law take cognizance of emotions as data? Individual legal provisions of this kind can be found in surprising numbers throughout the statute-books.

One preliminary point, though: If we take 'excesses of emotions' in a broad sense, we might include

10. Jeffrey O'Connell, *The Lawsuit Lottery*, New York 1979, pp. 32-33.

11. Stefan Breidenbach, *Mediation*, Köln 1995, pp. 141, 241.

even the wealthy thief who acts out of uncontrolled greed or the sadist who enjoys injuring another person, whoever that person may be. In order to stay within the allotted time and not to drift into too many directions, I shall limit my examples to instances of the strong and opposite emotions of love and hate, directed towards particular individual persons:

1. Criminal Law: Homicide

Let us begin with the most drastic example, homicide. In German criminal law, the intentional killing of another person is called *Totschlag* and, according to § 212 of the criminal code, is to be punished with a prison sentence of, depending on the circumstances, five years up to life imprisonment. There is, however, another section of the criminal code dealing with forms of intentional homicide under the heading of *Mord*, which carries a mandatory life sentence. What distinguishes *Mord* from *Totschlag*? § 211 of the criminal code lists a number of additional criteria for *Mord*. Some of these criteria refer to the way the crime was committed: for example by cruel means or in a way dangerous to public safety. Other criteria relate to motivation, like killing in order to commit some other crime, killing out of avarice or, as it is worded in the criminal code, "*sonst aus niedrigen Beweggründen*", which might be translated as "for other base motives."

a) Jealousy as Aggravating Factor

In an important decision in 1952, the German Federal Appeal Court, the *Bundesgerichtshof*, ruled that jealousy can be such a base motive. The facts of the case were that a man loved a woman, but the woman did not love the man. He planned to kill her, and eventually did so, because he loved her too much, viz, "weil wenn er sie nicht haben könne, sie auch kein anderer haben solle" ("[...] if he could not have her, no other man should have her)."¹² Thus, in the given circumstances love, an excess of selfish love, amounted in the circumstances to an aggravating factor, leading to a *Mord* verdict.

12. BGHSt 3, 180, 183 (*Entscheidungen des Bundesgerichtshofs in Strafsachen* = Federal Appeal Court Decisions, Criminal Cases, vol 3, p. 183).

b) Jealousy as a Mitigation Factor

On the other hand, jealousy can be a mitigating factor. According to § 213 of the criminal code, the sentence is only one year to ten years imprisonment, if, in certain circumstances, the killer is being provoked and acts on the spot. In a case in 1977 a husband in jealous rage killed the lover of his wife when he met him - although not *in flagrante delicto* - in his own house. The *Bundesgerichtshof* allowed the appeal against a lower court decision where this had been taken as ordinary *Totschlag*¹³.

2. Law of Succession: Disinheritance

a) Testator's Love

In German law everybody can leave their property by will to anybody. If the testator's spouse, children or, in some cases, parents are excluded from succession, they may claim an obligatory share of the value of the estate, but apart from that the testator is free in how to dispose of his property. Thus, a man, if he so wishes, could declare his nephew, his chess partner or his bowling club as his heir, rather than his wife or his son. No reasons need to be given, no reasonable grounds need to exist. Any kind of hatred against wife or son as a motive would not invalidate the testament. But could he leave everything to his mistress, if he loved her more than he loved his wife or son? Up to the 1960s the courts tended to regard this as excessive and such testaments as null and void; it was *contra bonos mores*. In 1970, however, the *Bundesgerichtshof* ruled that such testaments should be void only if the mistress's appointment as heir were in the circumstances to be regarded as payment for sexual services and nothing else.¹⁴

b) Hatred Against Testator

13. BGH MDR 1978, 110, 111 (Decision of the Federal Appeal Court, reported in *Monatsschrift für Deutsches Recht*, vol. 1978, p. 111).

14. BGHZ 53, 369 (*Entscheidungen des Bundesgerichtshofs in Zivilsachen* = Federal Appeal Court Decisions, Civil Cases, vol. 53, p. 369).

The heir, on the other hand, or the spouse or child claiming their obligatory share of the estate, need not love the testator to be entitled to the estate or their share thereof; they may hate him - it does not disqualify them. Excesses of hatred, though, do, if they result in actions like the killing or the attempted killing of the testator. In such cases, any person who would profit from a disqualification of the heir can take action to have the court can declare the heir as unworthy to be an heir, and as not entitled to take the estate.¹⁵

3. Family Law: Misuse of Parental Care

All modern legal systems have gone a long way since early Roman times when children were subject to *patria potestas*, their father's (or else oldest living male ancestor's) unfettered power of life and death.¹⁶ Nowadays even terminology has changed: instead of 'parental power', the traditional term, used in the German civil code until 1979, we find expressions like 'parental care' or 'parental responsibility'. If such responsibility is misused and the child endangered, the state authorities can apply a range of measures like giving advice to the parents, taking decisions for the child or, in the last resort, formally divesting the parents from parental care and transferring it - and the child - to some other person¹⁷.

Misuse is not in all cases a result of emotional excess. The opposite may be true: neglect of the child due to a lack of interest, a lack of any emotions towards the child. Or parents may be incompetent to fulfil without help the many tasks which parental care comprises. Nevertheless, hateful excesses against children do occur, and they are the prime example of cases where the courts apply their strongest measure and take the children away from their parents.

15. §§ 2339 ff. BGB (*Bürgerliches Gesetzbuch* = German Civil Code).

16. See, e.g., Barry Nicholson, *An Introduction to Roman Law*, Oxford, pp. 65-68

17. §§ 1626 ff. BGB (*Bürgerliches Gesetzbuch* = German Civil Code).

But can there be misuse through excessive love? Love, leading for example to overprotectiveness, hampering the child's development? And if so, would the authorities intervene? I haven't found cases falling neatly into this category, but I would like to mention a Swedish case which occurred a couple of years ago to show that overprotectiveness and excess can lead to an intervention of well-meaning state authorities: a child was taken away from the mother for the single reason that the mother was too fat. The child was teased at school by the classmates and the authorities decided that it was not good for a child's development to be teased at school on account of the mother.¹⁸

C. Conclusions

As result of this preliminary stock-taking I would like to suggest four conclusions and an outlook to further research:

1. There are plenty of points of contact between legal systems and emotions.
2. Substantive law takes cognizance of emotions in various fields.
3. There is no single or unified reaction of the law to emotional excess. Such excess can, for example, be an aggravating or a mitigating factor.
4. [and this is one tentative answer to Jürgen Schlaeger's introductory question: "Who defines emotional excess?"]: At least for the former type of reaction (aggravation) the law gives us a sharp criterion for distinguishing exactly between emotions and excess of emotions: from a legal point of view it is emotional excess if a negative sanction is attached to an act so motivated.

My little survey has been based on examples mostly from German law. As a next step the German cases should be compared with cases and legal provisions from other countries to see whether other legal systems react in the same way, i.e. whether they regard the same type of emotional excess as aggravating or mitigating or indeed whether the one perhaps regards as aggravating what for the other is a mitigating factor. Such differences might tell us about the underlying values of a legal

¹⁸ This is quoted from memory; I can give no source. For comparable cases, however, see e.g. Siv Westerberg, *Pflegschaft der Abkassierer*, *Die Zeit*, 14 July 1995.

system and the society where it operates.

In this morning's discussion, following Hillis Miller's paper, we talked about love and passion in French, English and American literature and the different roles these emotions play in the various national literary traditions. Juxtaposing the actual legal reactions (if any) to such emotions might show in how far such literary differences are literary phenomena only or whether they reflect (or are reflected by?) legal differences.

One point of caution seems to be appropriate, though: the actual state of the law of a country at any given point of time does not always coincide with the general perception of what the state of that law is. Very often the perception lags behind, sometimes for years, sometimes for decades, and reflects a legal reality long past. To give but one example: the distinction between *Mord* and *Totschlag*, as explained above, was introduced into German law more than half a century ago, replacing an earlier distinction along the lines of premeditated and non-premeditated intentional killing. Nevertheless, an opinion poll among the general public in Germany would probably result in reproducing the old state of the law. The relationship between the representation of emotions in literature and their role in the law may therefore in some cases well be one of asynchrony, either unintentional (the author shares the wrong perceptions of the time) or intentional (the author wants to depict people sharing the wrong perceptions of their time).

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